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No. 03-814

IN THE

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* MARITIME TRADES DEPARTMENT, AFL-CIO IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE MARITIME TRADES DEPARTMENT, AFL-CIO FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Comes now the Maritime Trades Department (MTD), AFL-CIO, by and through its below-named counsel, and hereby respectfully moves this Court, pursuant to the Court's Rules 21.2(b) and 37.2(b), for leave to file the attached *amicus curiae* brief in support of the petition for a writ of *certiorari* filed by Willard Stewart. Written consent for the filing of this brief was sought from the parties to the case and was obtained from the petitioner, but withheld by the respondent, Dutra Construction Company.

The MTD is one of the Trade and Industrial Departments of the AFL-CIO. It consists of 30 affiliated unions, with 24

port councils, representing workers in the maritime trades and related industries. It promotes employment in the maritime trades through legislative, political and labor action, and assists its affiliates in achieving their goals, including protecting the wages, working conditions, and safety and health of their members. One of the MTD's priorities is to see that injured maritime workers are afforded appropriate relief under the two primary federal statutes that provide for such relief: the Jones Act, 46 U.S.C. App, § 688, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C §§ 901-50. The issue raised by petitioner—the conflict in the lower courts over the proper approach to determining which watercraft are vessels for Jones Act purposes—is a crucial one for determining under which statute an injured maritime worker is entitled to relief. Therefore, the MTD, on behalf of the nation's maritime workforce, has an overriding interest in this Court's granting the petition for a writ of *certiorari* and resolving the lower courts' confusion.

It is for these reasons that the MTD respectfully requests that this Court grant this motion for leave to file the attached *amicus curiae* brief in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* MARITIME TRADES DEPARTMENT, AFL-CIO IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*[1]

The Maritime Trades Department (MTD), founded in 1948, is one of the Trade and Industrial Departments of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). It consists of 30 affiliated unions, with 24 port councils, representing workers in the maritime trades and related industries. Included among the MTD's affiliated unions is the International Union of Operating

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its affiliated unions, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

Engineers (IUOE). The petitioner in this case, Willard Stewart, is a marine engineer and a member of IUOE Local Union No. 25, Marine Division, which represents over 1,600 dredgemen and related workers working on dredges in the Great Lakes, the Atlantic Ocean, the Gulf of Mexico, and their tributaries.

The MTD promotes employment in the maritime trades through legislative, political and labor action, and assists its affiliated unions in achieving their goals, including protecting and improving the wages and working conditions of their members. In this regard, the MTD has a great interest in seeing that injured maritime workers are afforded appropriate relief under the two primary federal statutes that provide such relief: the Jones Act, 46 U.S.C. App. § 688, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50. As the remedies under these two statutes are mutually exclusive, the MTD strongly supports the adoption of uniform, comprehensible rules for determining when each is applicable, to assure injured maritime workers of a clear course to steer in seeking proper compensation and damages for their injuries.

In his petition for a writ of *certiorari*, the petitioner has demonstrated the lower courts' disarray on one aspect of the boundary between the two statutes—the standard to be used in determining whether a watercraft is a "vessel." This issue is of direct concern to *amicus* MTD, its affiliated unions, and their members. The lack of a uniform test for determining vessel status leaves members of the MTD's affiliates subject to changing statutory coverage for their injuries depending on where the watercraft on which they are employed are located. Thus, a marine engineer injured on a dredge in the San Francisco Harbor is likely to be covered by the Jones Act, while the same marine engineer performing the same type of

work on the same dredge will apparently not be covered if the dredge is located in the Boston Harbor. In the inherently mobile world of maritime employment, this state of affairs is clearly untenable and unfair.

The MTD submits this brief *amicus curiae*, in support of the petition, to reiterate the interrelationship of the Jones Act and the LHWCA and the importance, for the jurisprudence under both and the welfare of injured maritime workers, of this Court addressing the question presented by the petitioner.

SUMMARY OF ARGUMENT

The coverage of the Jones Act is limited to seamen, a term not defined in the statute. Disapproving of this Court's extension of Jones Act coverage to land-based stevedores, Congress passed the LHWCA, which provides an exclusive worker's compensation remedy for injuries to land-based maritime workers such as stevedores and specifically excludes from its coverage those maritime workers covered by the Jones Act, defining the exclusion as applying to "a master or member of a crew of any vessel." Subsequent decisions of this Court have equated "seaman" and "a master or member of a crew of any vessel." These same decisions have addressed the type of employment-based relationship to a vessel that is necessary for Jones Act coverage without offering anything other than implicit guidance on the threshold question of which watercraft are Jones Act vessels. Thus, the definition of "seaman" under the Jones Act turns in significant part on the injured maritime worker's relationship to a "vessel," a term actually found—but not usefully defined—in the LHWCA and not dealt with in this Court's decisions to date.

While the reference to terminology found in the LHWCA to determine the scope of Jones Act coverage demonstrates the interrelationship between the two, they are also a pair of *mutually exclusive* complementary remedial statutes. As a

result, for example, an affirmative determination that a particular watercraft is a "vessel" will not only have a positive impact on whether an employee is covered by the Jones Act; it will also have a negative impact on whether the employee is covered by the LHWCA. Under these circumstances, it is clear that a uniform approach to the vessel status question will assist not only in the administration of the Jones Act, but in the administration of the LHWCA as well. This is particularly true because, in actuality, the line between what is Jones Act employment and what is LHWCA employment is not always crystal clear; there is a "zone of uncertainty" between the two. This zone of uncertainty creates difficulties in the administration of both statutes, and the conflict among the circuits over the vessel status question only exacerbates the uncertainty faced by injured maritime workers who are subjected to the vagaries of varying results. Granting the petition here will afford this Court the opportunity to bring clarity to the vessel status question and thereby diminish the zone of uncertainty.

ARGUMENT

Whether A Watercraft Is A "Vessel" Is Critical To Deciding Whether An Injured Maritime Worker Is Entitled To Relief Under The Jones Act Rather Than The LHWCA; This Court's Intervention To Clarify The Approach To Be Used In Answering This Question Will Necessarily Assist In The Proper Administration Of Both Statutes.

In the decision below, the First Circuit determined that petitioner was not entitled to proceed on his Jones Act claim because the dredge *Super Scoop* upon which he worked was not a "vessel in navigation." Before reaching its conclusion, the First Circuit observed that the Justices of this Court have "spoken rather elliptically" concerning what constitutes a "vessel in navigation" and that the Justices "have left the

lower courts to fret, largely unguided, over what is—or is not—a vessel in navigation." (App. 21). In his petition for a writ of *certiorari*, the petitioner has comprehensively detailed the disarray resulting from the lower courts' unguided fretting. He has identified the multiple and vacillating approaches to the vessel status question used by the eight circuits that have considered it, and has correctly described as irreconcilable the different rules they have adopted. This brief will focus on one of the consequences of the conflict among the circuits: the addition of further complexity to the already difficult task of determining where the boundary lies between the Jones Act and the LHWCA and the attendant confusion faced by injured maritime workers seeking to pursue their legal remedies.

A. The Lower Courts' Conflict Over Which Watercraft Are Jones Act "Vessels" Complicates The Jones/LHWCA Demarcation.

Initially, a review of how the question of who is a "seaman" under the Jones Act came to be answered by reference to the LHWCA's exclusion from its coverage of a "master or member of a crew of any vessel" will serve to establish the interrelationship of the two statutes, and set the stage for why the adoption of a uniform approach to whether a watercraft is a "vessel" is necessary for the effective administration of both.

In *The Osceola*, 189 U.S. 158 (1903), this Court summarized the state of seamen's remedies under the general maritime law and held that seamen were excluded from the general maritime negligence remedy. In 1920, Congress passed the Jones Act, which provides a cause of action in negligence for "any seaman" injured "in the course of his employment." 46 U.S.C. App § 688. "The only purpose of the Jones Act was to remove the bar created by *The Osceola*, so that seamen would have the same rights to recover

for negligence as other tort victims." G. Gilmore & C. Black, Law of Admiralty 328-329 (2d ed. 1975), quoted in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

While the Jones Act removed *The Osceola*'s bar to negligence recoveries by seamen, it did not define the term "seaman." After the passage of the Jones Act, this Court construed "seaman" broadly. *Wilander*, at 347. Specifically, in *International Stevedoring v. Haverty*, 272 U.S. 50 (1926), this Court extended Jones Act coverage to a stevedore engaged in maritime employment, reasoning that: "We can not believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." *Id.*, at 52.

Congress demonstrated almost immediately that it had something else in mind, and, within six months of the *Haverty* decision, it passed the Longshore and Harbor Workers' Compensation Act (LHWCA) "which provides scheduled compensation (and the exclusive remedy) for injury to a broad range of land-based maritime workers but which also explicitly excludes from its coverage 'a master or member of a crew of any vessel.'" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995). This Court, somewhat belatedly, recognized that Congress' intention in passing the LHWCA was to overrule *Haverty* and to make the LHWCA and the Jones Act mutually exclusive.

This recognition came in *Swanson v. Marra Bros.*, 328 U.S. 1 (1946), where the Court considered a Jones Act claim brought by a longshoreman in the employ of a stevedoring company who, while on a pier in the Philadelphia harbor, was injured by a life raft that fell from the vessel he was loading. After reviewing the LHWCA's provisions and that statute's relationship to the Jones Act, the *Swanson* Court stated: "We must take it that the effect of these provisions of the

Longshoremen's Act is to confine the benefits of the Jones Act to *the members of the crew of a vessel plying in navigable waters* and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act." *Id.*, at 7 (emphasis added). Thus, in deciding *Swanson*, this Court referred for the first time to the LHWCA's exclusion of "a master or member of a crew of any vessel," as essentially describing what maritime workers were covered by the Jones Act, i.e., what maritime workers were "seamen."

After *Swanson*, this Court largely left the question of who was a "seaman" under the Jones Act to the lower courts. Then, in a series of cases[2] decided between 1991 and 1997, this Court addressed the disarray resulting from the lower courts' disagreements and defined the Jones Act's scope much more completely. In each instance, this Court stressed the close interpretive relationship between the Jones Act and the LHWCA, as well as their mutual exclusivity, and focused on the nature of the worker's employment relationship to a vessel, while remaining silent on the threshold question of what constitutes a "vessel."

The first of these cases, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), considered whether the term "seaman" was limited only to those who aid in a vessel's navigation. In her opinion for the Court, Justice O'Connor acknowledged the relationship between the language of the Jones Act and the LHWCA, stating: "'[M]aster or member of a crew' is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key

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[2] *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); and *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997).

requirement for Jones Act coverage now appears in another statute." *Id.*, at 347. She pointed out that the "aid of navigation" requirement for Jones Act coverage had arisen during the interim between the passage of the LHWCA and *Swanson*, and determined that "[T]he better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation." *Id.*, at 354. She concluded that: "The key to seaman status is employment-related connection to a vessel in navigation. . . [W]e hold that a necessary element of the connection is that a seaman perform the work of a vessel. . . [W]e believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.*, at 355 (citations omitted).

The *Wilander* Court also termed the question of who is a seaman as "better characterized as a mixed question of law and fact" and indicated that "the inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relationship to it." *Id.*, at 356. Picking up on this issue less than ten months later, the Court examined whether a ship repairman who worked on several "floating platforms" was, as a matter of law, excluded from coverage under the Jones Act by virtue of the LHWCA's express enumeration of "ship repairman" as one of the "harbor-worker[s]" specifically mentioned in the LHCWA's definition of "employee", 33 U.S.C. § 902(3). *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). Stating that "[A] maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act", the Court determined that summary judgment was inappropriate where

the ship repairman had raised questions of fact concerning whether the floating platforms were vessels in navigation and whether he had sufficient connection to the platforms to qualify for seaman status.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court further clarified *Wilander*'s "employment-related connection to a vessel in navigation" requirement, and concluded that two basic elements were necessary for a maritime worker to qualify as a Jones Act seaman: the worker's duties must contribute to the vessel's function or the accomplishment of its mission, and the worker's connection to a vessel in navigation (or an identifiable group of such vessels) must be substantial in both duration and nature. In reaching this conclusion, the Court reviewed its case law under both the Jones Act and the LHWCA and emphasized that the distinction between "sea-based" Jones Act-covered maritime workers and "land-based" LHWCA workers was status-based, i.e., based on the worker's connection to the vessel (or identifiable group of vessels) and not on whether the injury involved took place on land or at sea.[3]

Thus, to summarize, since *Swanson* this Court has recognized the Congressional intent that the Jones Act and the LHWCA be mutually exclusive and has looked to the LHWCA's exclusion of a master or member of a crew of any vessel to determine seaman status. Under the Court's current

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[3] *Chandris* involved whether a salaried superintendent engineer had a sufficient connection to his employer's fleet of six cruise ships to qualify as a seaman. The final case of the four, *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997), also addressed the circumstances under which an injured maritime worker could prove "seaman" status by an employment-related connection to a *group* of vessels rather than a single one. This Court determined that there needed to be a requisite degree of common ownership or control of the vessels, and held that, as a matter of law, such was not demonstrated where the only connection between a group of vessels was that each vessel hired some of its employees from the same union hiring hall.

jurisprudence, if a maritime worker's employment-based connection to a vessel (or group of vessels) contributes to the vessel's function or the accomplishment of its mission and is substantial in both duration and nature, that worker is a "seaman" and is to look to the Jones Act for recovery. On the other hand, if the worker is a "person engaged in maritime employment" who does not have a sufficient employment-based connection to a vessel, that worker is not a "seaman" and must look to the LHWCA for his or her remedy.

This summary demonstrates the central importance of a maritime worker's employment-related connection to a "vessel" in resolving the question of whether that worker's remedy lies with the Jones Act or the LHWCA. Yet the Jones Act does not contain the word "vessel," the LHWCA does not define "vessel" in a useful way,[4] and this Court has not offered any definitive guidance on how to determine whether a watercraft is a "vessel" under the Jones Act. It naturally follows that the varying approaches the petitioner has detailed among the lower courts concerning how to determine whether a watercraft is a "vessel" have only contributed confusion to the process of deciding which statute is applicable.

The confusion resulting from the lower courts' conflict on the vessel status issue can be concretely illustrated by focusing on two locations in the voyage of the dredge *Super Scoop*[5] on which petitioner worked—when it started out in

[4] See discussion of the LHWCA's definition of "vessel" at Section B of this brief.

[5] As stated on page two of the petition for a writ of *certiorari*: "To work on the Ted Williams Tunnel project, for example, the dredge was towed from its home base in California, through the Panama Canal, and up the Eastern seaboard to Boston Harbor." Thus, the dredge started in the waters of the Ninth Circuit, and likely passed through the waters of the Eleventh, Fourth, Third, and Second, before beginning to dredge in the waters of the First.

the waters of the Ninth Circuit and when it was in the First Circuit's waters prior to entering Boston Harbor—and applying the relevant circuit precedent concerning vessels. While in the waters of the Ninth Circuit, the dredge, under tow, was likely a vessel, since it was obviously not "permanently moored to the land."[6] And, while we know that the First Circuit determined that the dredge, when working in the Boston Harbor, was not a vessel, it probably *was* a vessel while in transit within the First Circuit's waters. See *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992) (en banc), *cert. denied*, 506 U.S. 827 (1992)("[I]f a barge or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seaman only when it is in actual navigation *or transit*." (Initial emphasis in original; subsequent emphasis added.)) Thus, the same watercraft—a dredge—may or may not be considered a Jones Act vessel depending on which Circuit it is in, and, even within the same Circuit, its status may change depending on what it is doing.

Without regard to what the appropriate approach to determining vessel status should be, suffice it to say that the demonstrated lack of clarity on which watercraft are vessels does not redound to the benefit of injured maritime workers weighing whether to seek relief under the Jones Act or the LHWCA. As demonstrated next, this lack of clarity is compounded by a series of lower court decisions that seem to hold that "vessel" has differing meanings depending on where in the LHWCA it is used.

[6] As the petitioner points out (*cert.* petition, at 14), it appears that, in the Ninth Circuit, floating structures qualify as vessels unless they meet *all* of the following criteria: they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate. *See Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1135 (9th Cir. 2002), quoting *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992).

B. The Lower Courts' Broad Reading of "Vessel" In LHWCA § 905(b) Cases Further Confuses The Line Between The Statutes.

We have described in Section A above how this Court has come to equate the Jones Act term "seaman" with the LHWCA's exclusion from its coverage of "a master or member of a crew of any vessel." This exclusion is found at 33 U.S.C. § 902(3)(G). The term "vessel" is also found at § 905(b) of the LHWCA, which grants an LHWCA-covered employee a third party claim for injury caused by the negligence of a vessel. The interpretation lower courts have given to the term "vessel" in the § 905(b) context demonstrates the need for additional guidance from this Court on the import of its decisions borrowing terms from the LHWCA to define the scope of Jones Act coverage.

§ 905(b) was added to the LHWCA by the 1972 Amendments, which, *inter alia*, replaced an LHWCA-covered injured employee's action for "unseaworthiness" with an action against the vessel for negligence. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 97 (1994). After the 1972 Amendments, the LHWCA, as summarized by the First Circuit in its second decision in the instant case,

> [I]s a comprehensive worker's compensation system which holds employers liable for compensating covered employees injured in the course of their employment, regardless of fault. 33 U.S.C. § 904. The statutory no-fault compensation payments provided by the LHWCA are considered 'exclusive and in place of all other liability of such employer to the employee.' Id. § 905(a). Therefore, employees covered by the LHWCA are statutorily barred from suing their employers for injuries incurred in the course of their employment. However, while the compensation scheme is the employee's exclusive remedy regarding his employer, the employee is still free to sue the *vessel owner* as a third party if his injury was caused by the negligence of the vessel. (Footnote omitted; emphasis in original.)(App. 5-6).

The 1972 Amendments also added, at § 902(21), a circular definition of the term "vessel." This definition provides that:

> Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

"Obviously this definition does not provide precise guidance as to what is included within the term 'vessel'," *McCarthy v. The Bark Peking*, 716 F.2d 130, 133, (2nd Cir. 1983), and the lower courts that have considered the question of what constitutes a "vessel" for purposes of a § 905(b) action have almost uniformly looked to the broad Federal Rules of Construction definition of vessel contained at 1 U.S.C. § 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." See the collection of cases cited in *The Bark Peking*, 716 F.2d at 133-135.

In several cases in which both a Jones Act claim and an alternative § 905(b) LHWCA negligence-of-a-vessel claim have been advanced, the courts have drawn a distinction between a "vessel in navigation" for Jones Act purposes and a "vessel" for LHWCA purposes, see *Stewart v. Dutra Construction Co.*, 343 F.3d 10 (1st Cir. 2003)(App. 1-14); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992). In these cases the courts, after determining that the relevant watercraft was not a vessel for Jones Act purposes, applied a different—"significantly more inclusive"—standard for determining whether the watercraft was a vessel for purposes of the LHWCA claim.[7] In each instance, the broad "vessel"

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[7] In its second decision in the instant case, the First Circuit cited its en banc decision in *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996) for the proposition that the LHWCA had the broader vessel

definition on which the court relied for § 905(b) purposes was the one found at 1 U.S.C. § 3. See, i.e., *Kathriner*, at 662.

In light of the case law development of the Jones Act described in Section A of this brief, the result in these cases is curious, to say the least. As we have seen, the Jones Act does not contain the word "vessel"; that term has been imported into Jones Act jurisprudence by the equation of the Jones Act term "seaman" with the LHWCA exclusion of "a master or member of a crew of any *vessel*." (Emphasis supplied). The LHWCA nowhere uses the term "vessel in navigation." To the extent this Court used an employment-related connection to a "vessel in navigation" to describe seaman status in its decisions in *Wilander* and *Chandris*, it was merely providing additional content to the LHWCA statutory exclusion of "a master or member of a crew of any vessel."[8] Nonetheless, the net effect of these decisions applying different standards for the term "vessel" in Jones Act and LHWCA cases is that, when used in § 902(3)(G) to exclude "a master or member of the crew of any vessel" from LHWCA coverage, the word "vessel" actually means narrowly "vessel in navigation," but when used in § 905(b) "vessel" has a broader meaning: it means "vessel" as defined in 1 U.S.C. § 3. These decisions—applying different meanings to the same word when it is used in two different places in the same statute—would appear to defy normal rules of statutory construction.

These cases' interpretation that "vessel" as used in § 902(3)(G)'s exclusion of "a master or member of a crew of any vessel" is narrower than "vessel" as defined in 1 U.S.C. § 3 would also seem to conflict with this Court's decision in *Norton v. Warner Co.*, 321 U.S. 565 (1944). In *Norton*, the

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definition and noted that, accordingly, Dutra had conceded that the dredge and the scow in question were vessels for LHWCA purposes. (App. 5).

[8] It is worth noting that, in the passage from *Wilander* quoted at pages 12-13 of this brief, Justice O'Connor uses the terms "vessel in navigation", "vessel", and "ship" interchangeably.

issue was whether a bargeman was a harbor worker or "a master or member of the crew of any vessel"; in the latter event the bargeman would be excluded from LHWCA coverage. This Court held that a barge constituted a "vessel" as the term was used in the exclusion, stating "A barge is a vessel within the meaning of the Act even when it has no power of its own since it is a means of transportation on water" and citing 1 U.S.C. § 3's definition of "vessel" in support of its conclusion. *Id.*, at 571 and fn. 4. While *Norton* was a pure LHWCA case that pre-dated *Swanson*'s recognition of the mutual exclusivity of the Jones Act and the LHWCA and came long before the adoption of the 1972 LHWCA Amendments, there is little reason to question the view expressed in it that "vessel" as used in § 902(3)(G)'s exclusion has the meaning given the word by 1 U.S.C. § 3's definition.

At this point, one is tempted to agree with Judge Toruella: "A vessel is a vessel is a vessel is a vessel." *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1129 (Torruella, J., dissenting) (1st Cir. 1992) (en banc). In any event, the conundrums presented by the lower courts' approaches to determining which watercraft are vessels call out for this Court's guidance.

C. This Court's Intervention Is Necessary To Resolve The Vessel Status Issue.

We have described above how the current test for seaman status is founded on this Court's understanding of Congress' intent that the Jones Act and the LHWCA are "mutually exclusive" and have drawn from that description the natural conclusion that decisions on the appropriate scope of the Jones Act inevitably also delineate the parameters of the LHWCA. However, in the same cases in which it has declared the two statutes' mutual exclusivity, this Court has acknowledged the difficulties in drawing the line constituting

their mutual boundary. See *Chandris Inc. v. Latsis*, 515 U.S. 347, 356 (1995)("[D]rawing the distinction between those maritime workers who should qualify as seamen and those who should not has proved to be a difficult task and the source of much litigation—particularly because 'the myriad circumstances in which men go upon the water confronts courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman.'" (Citation omitted.)); *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548, 550(1997) ("The distinction between the two mutually exclusive categories can be difficult to implement, and many cases turn on their specific facts.").

The difficulties described in this Court's decisions are manifested in the lower courts' struggles with the boundaries between the two statutes. The reasons for these struggles are legion, and are not confined solely to the myriad of maritime employment situations referenced in *Chandris*. Also complicating the determinations are supremely practical reasons why injured maritime workers may seek to bring their cases under one statute rather than the other: differing insurance coverage limits in particular cases; the nature of the remedies available under the two laws; a preference for the forum of a Jones Act jury trial rather than an LHWCA administrative proceeding before an administrative law judge; and concern over the standard of care applied in Jones Act negligence cases,[9] to name only a few. Moreover, Congress did not

[9] In light of the holding in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) that seamen in Jones Act negligence cases are bound to a standard of ordinary prudence in the exercise of care for their own safety, not to a lesser duty of slight care, the Editor of the U.S. Department of Labor, Office of Administrative Law Judges *Judge's Benchbook: Longshore and Harbor Workers Compensation Act* (January 2002), has opined: "Thus, a worker preferring the security of workers compensation will file under the LHWCA coverage rather than gamble on a Jones Act claim where a finding of unreasonableness on the part of the maritime worker could deny him coverage." 1-13.

intend to require an election of remedies between the two statutes, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 at fn. 5 (1991), and, as remedial statutes, both are to be construed liberally. See *Cox v. Roth*, 348 U.S. 207, 210 (1955)(The Jones Act "As welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes.") (quoting *Cosmopolitan Co. v. McAllister*, 337 U.S. 783, 790 (1949)); *Voris v. Eikel*, 346 U.S. 328, 333 (1953)("This Act [the LHWCA] must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."). Under these circumstances, there should be no wonder that there exists between the two statutes a "zone of uncertainty."[10]

It is not *amicus'* purpose here to overemphasize this zone of uncertainty, or to suggest that it can be eliminated. Rather, we merely acknowledge its existence and point out how the lack of guidance from this Court on the question of what constitutes a "vessel" contributes unnecessary additional indeterminacy. By granting the petition for a writ of *certiorari* and addressing the vessel status question, this Court can bring clarity to a confused, complicated area of the law and limit wasteful, reduplicative litigation. On behalf of the nation's maritime workforce, we urge this Court to take advantage of the opportunity presented by petitioner.

[10] The term "zone of uncertainty" was used by the Fifth Circuit pre-*Wilander*. See *McDermott v. Boudreaux*, 679 F.2d 452, 459 (5th Cir. 1982); *Simms v. Valley Line Company*, 709 F.2d 409, 412 (5th Cir. 1983). Despite the substantial clarification obtained from *Wilander* and the other cases discussed in Section A of this brief, the term continues to describe accurately the situation along the border between the Jones Act and the LHWCA.

CONCLUSION

This Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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